IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 132 of 1991

with

CRIMINAL APPEAL No 206 of 1991

For Approval and Signature:

Hon'ble MR.JUSTICE S.M.SONI and
MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

NARESH JANIMAL LOHANA(SINDHI)

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 132 of 1991
MR KJ SHETHNA for Petitioner
MR SR DIVETIA, APP, for Respondent No. 1

2. Criminal AppealNo 206 of 1991
MR SR DIVETIA, APP, for Petitioner
MR ADIL MEHTA FOR the respondent

CORAM : MR.JUSTICE S.M.SONI and
MR.JUSTICE J.R.VORA

Date of decision: 27/02/98

ORAL JUDGEMENT (Per S.M.Soni, J.)

In old Modikhana, Fateganj area of Baroda City, Joseph, Najrat and Daud, sons of Fulji were residing. Joseph has two sons namely, Ashok and Robin. Najrat has two sons named Ravikant and Timoti and Daud has two sons named Lajrat and Philip. Three sons of Fulji were residing on each storey of their house. Near about their house, one Naresh and Lalchand, two brothers, were residing. Naresh and Lalchand are Sindhis while Fulji's sons are Christians. In the said locality, most of the residents are Christians. At about 11 a.m. to 11.15 a.m. on 12th June, 1990, ladies of both the houses had a quarrel on the question of throwing waste of mangoes. Joseph, PW 1, persuaded the mother of Naresh and Lalchand and requested her to go to her house. However, she was annoyed and she was pushed. Naresh and Lalchand who were standing there with their mother went in their house with their mother. Immediately, thereafter, both the brothers had got enraged and came out. Naresh had a knife which he drew out. As other members of the family of Fulji had gathered, Naresh gave a knife blow on Najrat. Other family members had tried to catch hold of him and Naresh started wielding knife which then injured Ashok, PW 2, Daud, PW3 and Lajrat PW 5. Lalchand had an iron rod by which he injured Joseph, PW 1. Naresh then ran away and Lalchand was caught. Someone then telephoned the police, who reached at the scene of offence. After the arrival of police, all the injured were removed to hospital. Najrat being seriously injured succumbed to the injury in the hospital. Constable on duty one Udesing Chandrasinh informed the Sayaji Ganj Police Station on information received by him from Dr. A.N.Tharode as to this incident (Ex.32) at about 12.10 p.m. On receipt of this information, offence was registered and PW 19 started investigation. Offence was registered against Naresh as accused No.1 and Lalchand as accused No.2 under section 302 read with section 34 as well as under sections 307, 326, 323, 504 of Indian Penal Code and section 135 of the Bombay Police Act.

On completion of investigation, both the accused were chargesheeted and on completion of trial, after hearing the parties, the learned Additional Sessions Judge convicted Naresh Jenimal Lohana, accused No.1 under section 302, 326 and 324 of the Indian Penal Code and sentenced him to undergo rigorous imprisonment for life by order dated 10th January, 1991 in Sessions Case No.115/90. The learned Addl. Sessions Judge recorded acquittal of the charges levelled against Lalchand

Janimal Lohana. Naresh Jenimal Lohana has filed Criminal Appeal No.132/91 against the order of conviction and the State has filed Criminal Appeal No.206/91 against the order of acquittal of Lalchand. As both the appeals arise from the same judgment and order, we propose to dispose of the same by this common judgment.

We will first deal with the conviction appeal. Learned counsel Mr K.J.Shethna appearing for the appellant-accused has challenged the conviction on the ground that the learned Addl. Sessions Judge has erred in relying on the evidence of the prosecution witnesses who are parties and interested witnesses and are not corroborated by any independent evidence. He has challenged the conviction on the ground that the case of the accused would fall within exception 4 of section 300 of Indian Penal Code and therefore, the conviction under section 302 is bad. At the most, he contended in the alternative that the case may fall under section 304 Part II of the Indian Penal Code.

Mr.Shethna took us through the evidence of the prosecution witnesses and contended that all the brothers of the accused have identical face and when the prosecution witnesses admit that they do not know the name of each of the brothers, then it is difficult to say that which of the brother has assaulted and caused injury to the prosecution witnesses. In view of this fact, the benefit of doubt should go to the accused as identity of the accused is not established beyond reasonable doubt. To support this contention, he submitted that when all the injured prosecution witnesses, namely, PW 1, 2, 3, 5 and the deceased were taken to the hospital, they have simply stated that they are stabbed while disclosing the history as to how the injuries were caused. None of them have referred or disclosed the names of the assailant. Thus, it is clear that when the faces of all the brothers of the accused are identical and the names of the accused and their brothers are not known and when the names of the assailants are not disclosed before the doctor before whom immediately they were taken, and the doctor had inquired from them about the history, non-disclosure of the names suggests that they were not knowing which of the accused has assaulted them. Mr Shethna contended that it is mystery as to how the name came to be disclosed in a subsequent 'vardhi'.

It will be relevant to refer to the evidence of PW 1 who has in his deposition stated that ladies have quarrelled on the question of throwing waste of mangoes. He had come down on hearing that verbal exchange. He had

tried to persuade the mother of the accused and tried to persuade her to go home. On this count, mother of the accused had been annoyed and he gave a push. Thereafter, accused and their mother went in their house and she told something to the accused and both the accused got enraged and came out. Accused who had put in a green shirt, whose name was disclosed in the court as Naresh, took out knife. By the time children of his house had also come and on their arrival both the accused were confused. Accused No.1 Naresh then gave a knife blow to Najrat which blow fell on the right side of his belly. When the witness and his son Ashok and Lajrat caught hold of the accused, Naresh wielded knife which injured Ashok, Lajrat and Daud. By that time, the witness was injured by iron rod by Lalchand. Someone informed the Police and Police came there. When Police came, Lalchand was caught and Naresh ran away who was subsequently caught by the police. Both of them were taken to the Police station. After the police came to the spot, injured were taken to the hospital and from the hospital 'vardhi' (Ex.32) was sent to the Police station. In the cross-examination of this witness, it had been tried to show that in the complaint he has not stated that the mother of the accused went in the house and she told something to the accused and both the accused were annoyed. He has denied this part. He has admitted that he has not stated in his complaint that on arrival of his sons both the accused confused. No attempt is made nor this part is tried to be contradicted from the evidence of the Investigating Officer or the Officer who has filed the complaint. Unfortunately, that complaint is exhibited as it cannot be said to be a first information report in the eye of law. It is a matter of record that the complaint given by PW 1 was given by him in the hospital when he was under treatment. Before his complaint was recorded, constable on duty in the hospital has sent 'vardhi' Ex.32 to the Police station and that vardhi discloses cognizable offence. Therefore, when that vardhi is exhibited as FIR, we are of the view that the learned Addl. Sessions Judge has not committed any error in not exhibiting the complaint of PW 1 which became a statement before the Police and also there cannot be two first information reports.

Despite the fact that complaint of PW 1 being not exhibited, contradictions in the evidence of PW 1 are not proved through the concerned Investigating Officer. Thus, the facts stated by PW 1 remains uncontroverted except those admitted by him in the cross-examination. Evidence of PW 1 is, in substance, corroborated by the evidence of PW 2, 3 & 5 as well as the evidence of PW 6 &

7. Therefore, we do not propose to detain ourselves much on the fact that in a petty quarrel near their house appellant came out with a knife from his house and stabbed Najrat and when he was tried to be caught by others, he wielded knife which injured other witnesses.

PW 1 has stated that when the accused wielded knife, it injured Ashok, PW 2, and Lajrat PW 5. Ashok was injured on the chest and Lajrat was injured on the belly portion in the right side. Accused No.2 Lalchand had an iron rod at that time which was hit on his head. Accused Naresh had given a knife blow to Daud, PW 3 in his arm pit. Thus injuries to respective witness, namely PW 2, 3 & 5 are corroborated by their evidence also. PW 2, 3 & 5 also corroborated PW 1 on the fact that accused Naresh had given a knife blow on Najrat. This part of evidence of injuries caused to PW 1, 2 & 5 is further corroborated by independent evidence of Dr. Khyatiben, PW 15. Immediately after the incident and the witnesses have been injured, they were taken to the hospital and were examined and treated by Dr.Khyatiben, PW 15. In her evidence, she has deposed and proved the injuries on each, namely, Lajrat, PW 5 (Ex.35), Daud PW 3, (Ex.36) Joseph PW 1 (Ex.37) Ashok PW 2 (Ex.38) and Najrat who has died (Ex.39). Dr. Khyatiben PW 15, has stated that all these injuries on these witnesses can be caused by sharp edged weapon. She has admitted that injury on the person of Joseph cannot be caused by an iron rod. Thus the fact remains that at the time of incident a knife blow was given by accused to Najrat and has caused injuries to PW 2, 3 and 5 while he was wielding the knife. We do not find any reason not to accept the evidence of these witnesses on this count and the learned Addl. Sessions Judge cannot be said to have erred in accepting that evidence.

The question is whether the alleged injuries are caused in the circumstances as contended by the learned counsel Mr.Shethna. According to Mr Shethna, it is clear from the evidence that there was a sudden fight without premeditation and in the heat of passion upon a sudden quarrel, accused without taking undue advantage and/or having not acted in cruel or unusual manner, the act was committed and therefore the act will squarely fall within exception 4 of section 300 of the Indian Penal Code.

To appreciate this contention, it will be necessary to refer to the relevant evidence of the witnesses. PW 1 in examination-in-chief has stated that he persuaded the mother of the accused and requested her to go to her house. She was, therefore, annoyed and he

gave a push. Both the accused and their mother was standing nearby. The mother of the accused got enraged and she went in her house and she told something to the accused and both the accused were enraged. They came out and Naresh, who had put in a green shirt took out knife. Other children of the family had arrived and both the accused were confused and accused No.1 Naresh gave knife blow to Najrat and when he was tried to be caught hold of by others, he wielded knife and caused injuries. In the cross-examination, PW 1 has admitted that it took about an hour from the time of verbal exchange till the police came. The scuffle continued for about 15 minutes. He has denied that his children had razor and knife and there was scuffle and beating wherein the witnesses were injured. It is not true that accused Naresh had stabbed Najrat. Accused Naresh had started wielding knife and the witnesses were busy in warding off the same and Naresh gave first blow of knife to Daudbhai. When my brother went to persuade accused then accused inflicted blow on the deceased and then while wielding, Ashok was injured. From these two set of evidence, namely, examination-in-chief and cross-examination, the fact emerges is that there was initially a verbal exchange and then there was scuffle and during that scuffle there was inter-se beating also. During this scuffle and beating, it appears that prosecution witnesses one after other joined in the scuffle and at that point of time, accused gave a blow of knife which fell on Najrat. If we read the evidence of Ashok, PW 2, he has admitted that when he reached the scene of offence, both the accused were quarrelling with his uncle Najrat and his uncle, brothers and father were also there. In the cross-examination, he has admitted that when he caught hold of Lalchand, he was injured. Witness Daudbhai, PW 3, in the examination-in-chief has stated that he persuaded the mother of the accused stating "..... are you abusing as waste of mangoes is thrown. If you would have told us we would have cleaned the same". Then he stated that "his brother Joseph had come and he also tried to persuade them. Then Najrat came, he also tried to persuade them. Accused Naresh was very much annoyed and came out with a knife. Naresh gave a knife blow to my brother Najrat who fell down. Naresh gave a knife blow to my brother Lajrat also. In the meantime, Ashok came there. He tried to rescue. As Ashok tried to rescue, Naresh gave knife blow to Ashok. I also went there and Naresh gave a knife blow on my left arm pit." If we read the evidence of PW 2, 3 and 5 with that of PW 1, it is clear that there was verbal exchange during which push was given to the mother of accused by PW 1, which made the temper to run high and one after another PW 3 and 5

and their children came. Then there was scuffle and inter-se beating wherein accused No.1 who had knife injured the deceased and others. But the fact remains that there was sudden quarrel on a heat of passion which resulted into sudden fight. There was no premeditation for the simple reason that they have gathered on the spot because of domestic quarrel between the ladies on the question of throwing some mango waste. It appears from the evidence of PW 1 that it was PW 1 who gave a push to the mother of the accused which might have provoked the accused and their mother. It is in evidence that they went in their house and mother told something to the accused as a result of which they came out and there was scuffle and beating. So when the victim side had given provocation by push to the mother and as a result of which there was sudden fight in the heat of passion and if the accused have given a blow of knife on the brother of PW 1, who has given the provocation, in our opinion, he is entitled to whatever benefit he could get on being provoked by the brother of the victim Najrat. There was verbal exchange, there was scuffle and there was beating. Provocation by push to the mother of the accused, in our opinion, is sufficient to bring the case of the accused in the purview of exception 4 of section 300. So far as exception 4 of section 300 is concerned, the act also should be without premeditation. The quarrel took place in between the two houses. Distance between two houses appeared to be of about 8 to 10 feet where it cannot be said that any weapon in the house is not handy. This is in particular with the fact that a push was given by PW 1 to the mother of the accused as a result of which they went in their house and something was disclosed by the mother to her sons which then resulted into the present fact situation. The question is whether can it be said that an undue advantage is taken by the accused or whether he has acted in a cruel or unusual manner. As it appears, this locality is dominated by Christians. It was the only house of accused who belong to Sindhi community. At the time of scuffle, almost all male members of the family had gathered and participated in the scuffle. One of them is a watchman and another is a rickshaw driver. With persons who have such occupation, if accused have apprehended something in the mind it is natural particularly when all of them have participated in the scuffle and they were only two brothers against as many as six or more persons. In the circumstances, it cannot be said that the accused have taken any undue advantage or acted in a cruel or unusual manner as the blow inflicted by the accused was on the person of the opposite side and not to a particular person. When in a scuffle a blow is given, it cannot be said that that blow

was an intended blow. The fact that accused was wielding knife suggests that he was surrounded by persons and from where he wanted to escape. If he would have given blow, there was no necessity for him to wield the knife. He could have equally given blow as alleged by the prosecution on Najrat. But the situation and circumstances suggest that instant fight took place in a sudden heat of passion upon a sudden quarrel and it cannot be said that the accused had acted with premeditation. Thus, in our opinion, the case of accused would fall within the purview of exception 4 of section 300 of Indian Penal Code.

So far as the injuries on the person of PW 2, 3 & 5 alleged to have been caused by accused No.1 is concerned, the parties have not seriously contested the same or disputed the same. Injuries on the person of said witnesses are duly proved. However, the fact remains that the said injuries are caused by accused No.1 in the course of scuffle and sudden fight which took place.

Mr Divetia, learned APP, relying on a judgment in the case of Babubhai Ranchodbhai Patel v. State of Gujarat (AIR 1994 SC 1400) contended that the accused has straightway inflicted knife blow on the deceased which was sufficient in the ordinary course of nature to cause death and therefore the case would fall under clause 3 of section 300 and not in any exception of section 300 of the Indian Penal Code. It has been clearly observed by the Supreme Court in the above case that "one can understand if there had been some grappling or struggle between A-1 and the deceased and in the course of which if he came to inflict an injury perhaps a doubt may arise whether he aimed and intended to cause that particular injury during that grappling or struggle". In the instant case, we have already quoted the relevant evidence from where it is clear that initially verbal exchange started and then there was free-hand beating wherein persons were injured and at that time knife blow was inflicted on the deceased. In that course of event if a blow was given, in our opinion, it cannot be said to be an intended blow for a particular place to bring in the case in the ratio of Babubhai's case.

Mr Shethna has relied on some decisions of the Supreme Court, i.e. AIR 1989 SC 1904, AIR 1981 SC 1441, AIR 1990 SC 1047 and AIR 1990 SC 2252 showing and suggesting that there was provocation and in the heat of passion upon a sudden quarrel there was sudden fight and the incident took place and the accused injured the

deceased and other witnesses. As we have come to the conclusion that the case of the accused would fall within the purview of exception 4 of section 300, we do not propose to discuss these authorities in detail.

This bring us to consider the State Appeal against accused No.2. Accused No.2 was caught on the spot with an iron rod. It is the case of PW 1 that he was injured on the head by accused No.2. This part of evidence is not corroborated by medical evidence. Injury on the head of PW 1 can be by a sharp edged weapon and not like an iron rod attributed to accused No.2. PW 2, 3 and 5 supports the case of PW 1 that accused No.2 inflicted blow of iron rod on the head of PW 1. But this part of evidence is not corroborated by independent evidence like that of medical evidence. The fact remains that accused No.2 was also present when the scuffle and the quarrel took place. There is nothing in evidence of any of the PWs that an attempt was made by PW 2 to run away from the spot. He was handed over to the Police. Nothing incriminating is found from the person of this accused. Iron rod alleged to have been used by which injury was caused on PW 1 also cannot be taken as an incriminating substance as injuries caused on the person of PW 1 could not have been caused by the said iron rod as alleged by Dr. the prosecution witness. Except the presence of accused No.2 at the scene of incidence and when the witnesses cannot be believed on the aspect of his participation in the incidence, we do not find any reason to interfere with the order of acquittal recorded by the learned Addl. Sessions Judge.

The learned Additional Sessions Judge though has held the appellant guilty of offence under section 326 and 324 of the IPC, has not passed separate sentences. We are of the opinion that on proper reading of section 324 and 326 of IPC read with section 354 of the Code of Criminal Procedure, separate order of sentence is required to be passed for each of the offence held proved and convicted. In the instant case, the learned Addl. Sessions Judge has not passed any order as to sentence saying that the accused is sentenced to rigorous imprisonment for life. In our opinion, simply because the accused is sentenced to life imprisonment does not absolve the Court from passing order of sentence for each of offence for which the accused is held guilty. Reason is that if the order of conviction under the offence for which sentence passed is required to be set aside, and confirmed for the offences for which no sentence is passed, then what sentence is to be confirmed by the

appellate court. Appellate court can pass an order of sentence, but question would be, whether appellate court can pass an order of sentence without hearing accused on the question of sentence as required under the provisions of the Code of Criminal Procedure 1973 ? In our opinion answer is in the negative. To avert such a situation and relieve the appellate forum from following that procedure of hearing accused which normally would cause great inconvenience at appellate stage it is a must for the trial Judge to pass an order of sentence for each of the offence proved against the accused. We are, therefore, of the opinion that separate order of sentence is required to be passed against the accused for each of offence proved and in this case under section 326 and 324. Accused was heard heard before the learned Addl. Sessions Judge on question of sentence for all offences proved. However, in the facts of the present case, we order that appellant accused is sentenced to rigorous imprisonment for five years and two years under section 326 and 324 respectively.

In the result, the State appeal fails and is dismissed. Bail bond of accused No.2 stands cancelled. Appeal of the original accused No.1 is partly allowed. The order of conviction and sentence under section 302 of Indian Penal Code is set aside. However, the appellant accused is held guilty of offence punishable under section 304 Part II of IPC and is ordered to undergo rigorous imprisonment for a period of seven years. All the sentences are ordered to run concurrently.

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